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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 757.

HENRY W. GORANSON,
Administrator with the Will Annexed of the Estate of Harold T. Goranson, Deceased,
Petitioner,

vs.

CAPITAL AIRLINES, INC. and
UNITED AIR LINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner, Henry W. Goranson, respectfully prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the case of Henry W. Goranson, as Administrator with the Will Annexed of the Estate of Harold T. Goranson, deceased, vs. Capital Airlines, Inc. and United Air Lines, Inc., on May 25, 1965 (as amended on August 26, 1965 upon petitioner's Petition for Rehearing).

OFFICIAL REPORT OF THE OPINION BELOW.

The opinion of the United States Circuit Court of Appeals in this case (Appendix A hereto) is reported in 345 F. (2d) 750. As so reported the opinion incorporates the corrections and additions to the opinion that were ordered (Appendix B hereto) by the Court of Appeals in passing on petitioner's petition for a rehearing before that court.

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix C hereto) was entered on May 25, 1965. Thereafter a petition for rehearing was filed and the court entered on August 26, 1965 an order (Appendix B hereto) amending its opinion, but in other respects overruling the petition for rehearing.

The statutory provision conferring on this court jurisdiction to review the judgment or decree in question by a writ of certiorari is 28 U. S. C., Section 1254 (1) which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

THE QUESTIONS PRESENTED FOR REVIEW.

1. When Article I, Section 19a of the Constitution of Ohio provides "The amount of damages recoverable by civil action in the courts for death by the wrongful act, neglect or default of another shall not be limited by law," in a civil action instituted to recover from a Delaware corporation for the wrongful death of an Ohio decedent as a result of an airplane crash, can a United States District Court in Ohio limit recovery to Thirty Thousand Dollars ($30,000.00) merely because of the fortuitous circumstance that the crash occurred in Virginia (which has a statute providing such limitation) although Virginia has no interest whatsoever in the outcome of such litigation?

Stated differently, can a United States District Court in Ohio, on the basis of a non-existent, illusory and spuri-

ous "conflict" of a Virginia statute with the Ohio Constitution (when no purposes of the Virginia statute would or could be advanced by applying such statute), disregard and override the Constitution of Ohio, thus placing the principal financial burden of defendants' negligence on decedent's survivors rather than, as required by the Constitution of Ohio, distributing such burden as a part of the cost of defendants' doing business?

2. Is the arbitrary and capricious application of the limitation of the Virginia statute, to disregard and override the Constitution of Ohio, a denial of "equal protection of the law" or "due process of law" under the 14th Amendment of the Constitution of the United States?

3. Did the Court of Appeals erroneously and improperly decline to decide the controlling issue in this case, on the theory that the question never having been passed upon by the Supreme Court of Ohio, the Court of Appeals was prohibited from passing on the question in the first instance?

4. The Court of Appeals having stated in its opinion (p. 751) "it is conceded that the Supreme Court of Ohio has never decided the particular question involved" should this Court now decide such question, or employ some procedure to secure a decision from the Supreme Court of Ohio?

5. Is the decision of the Sixth Circuit Court of Appeals in this case in conflict with the holding of the Second Circuit Court of Appeals in *Pearson vs. Northeastern Airlines*, 309 F. 2d 553 (Certiorari denied 372 U. S. 539)?

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES.

1. The Fourteenth Amendment to the United States Constitution provides in part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Constitution of the State of Ohio, Article I, Section 19a provides:

> "19a. Damages for Wrongful Death.
>
> "The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law. (Adopted Sept. 3, 1912.)" (Page's Ohio Revised Code Appendix, page 404.)

3. Revised Code Title 21, Section 2125.02 provides:

> "§ 2125.02 Proceedings, (GC § 10509-167).
>
> "An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children and other next of kin of the decedent. The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought. Except as otherwise provided by law, every such action must be commenced within two years after the death of

such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid." (Page's Ohio Revised Code, Title 21, page 401.)

4. Revised Code, Title 21, Section 2125.03 provides:

"§ 2125.03 Distribution to beneficiaries. (GC § 10509-168.)

"The amount received by a personal representative in an action for wrongful death under sections 2125.01 and 2125.02 of the Revised Code, whether by settlement or otherwise, shall be distributed to the beneficiaries or any one or more of them, and unless the share of each is adjusted among themselves, the court making the appointment shall adjust such share in such manner as is equitable, having due regard to the pecuniary injury to each beneficiary resulting from such death and to the age and condition of such beneficiaries. In making such distribution, the court may also consider funeral expenses and other items of expense incurred by reason of the death." (Page's Ohio Revised Code, Title 21, page 408.)

5. The Virginia Code, Section 8-636 provides:

"Damages.

"The jury in any such action may award such damages as to it may seem fair and just, not exceeding thirty thousand dollars, and may direct in what proportion they shall be distributed to the surviving widow or husband and children and grandchildren of the deceased, * * *. The maximum amount of damages that may be awarded under this section to thirty thousand dollars shall not apply to any cause of action arising prior to July one, ninteen hundred fifty-eight." (Code 1919, § 5787; 1920, p. 27; 1942, p. 337; 1952, c. 60; 1958, c. 387.)

CONCISE STATEMENT OF THE CASE.

(a) Basis for Federal Jurisdiction in the Court of First Instance.

Plaintiff is a citizen and resident of Ohio, appointed by the Probate Court of Wood County as Administrator with the Will Annexed of Harold T. Goranson, deceased, such decedent having been a resident of Ohio at the time of his death. Defendants were Delaware corporations (consolidated on June 1, 1961 under the laws of Delaware into a single corporation under the name United Air Lines, Inc.) engaged in business in Ohio, with their principal place of business outside the State of Ohio. The matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000) exclusive of interest and costs. The United States District Court for the Northern District of Ohio, Western Division, had jurisdiction over this case under the provisions of 28 U. S. C., Sec. 1332, which so far as pertinent provides:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different states; * * *"

(b) Facts Material to the Consideration of the Questions Presented.

This is a wrongful death action under the Constitution and laws of Ohio, filed on November 14, 1961 in the United States District Court for the Northern District of Ohio, Western Division, to recover for the pecuniary loss to decedent's widow and five minor children; and they are the sole beneficiaries of any recovery that may be realized. At the time of decedent's death his widow was thirty-nine

years of age, his eldest child was twelve years of age and the youngest child was born posthumously.

Petitioner, hereinafter referred to as plaintiff, is Henry W. Goranson, Administrator with the Will Annexed of the Estate of his brother, Harold T. Goranson, deceased, hereinafter referred to as decedent, or Captain Goranson.

Defendants-appellees in the courts below were Capital Airlines, Inc. and United Air Lines, Inc., common carriers of passengers by air, hereinafter referred to as defendant.

Captain Goranson at the time of his death was forty-three years of age, a resident of the State of Ohio, and a Captain in the United States Navy. Except for his untimely death, today he would be an Admiral.

On January 18, 1960 Captain Goranson was traveling under official orders of the United States Navy as a commercial passenger on a Vickers-Armstrong Viscount aircraft of the then Capital Airlines, Inc. While the plane was enroute from Washington, D. C. to Norfolk, Virginia it crashed in the vicinity of Charles City, Virginia, killing all aboard including Captain Goranson.

The crash was caused by defendant's negligence in the maintenance and operation of defendant's plane; such negligence in several respects (relating to maintenance and operation under icing conditions) having continued over an extended period of time (up to 18 months) antedating the crash. The allegations of negligence in the Complaint (summarizing and paraphrasing the findings of a Civil Aeronautics Board investigation) asserted:

> "8. The death of plaintiff's decedent was caused by the negligence of defendant, Capital Airlines, Inc., in the maintenance and operation of the airplane.
>
> "9. The negligence of defendant, Capital Airlines, Inc., in addition to that hereinabove alleged, consisted of:

(a) Operating the airplane without making necessary tests and inspections to determine whether any hazard or danger existed through malfunction or misarming of the engine ice-protection systems, or through inadequacy of the electrical energy supply system when required to unfeather propellers and relight engines under icing conditions;

(b) Permitting its pilots to operate the airplane in flight without having the ice protection for all four engines switched 'ON' during every flight at all times when the indicated outside air temperature was below plus 10°C;

(c) Failing to warn its pilots that it was dangerous to follow the direction to 'descend to warmer climate' contained in said defendant's emergency checklist and Capital Airlines Flight Manual;

(d) Failing to give its pilots instructions with reference to Change 15 of the Air Registration Board (ARB) Manual, issued in July, 1958, changing the operation of the ice-protection system of the Viscount and failing to include such instructions in its Airlines Flight Manual;

(e) Failing to adopt a system to check its pilots, including the one having command of the aforementioned flight, to ascertain that they had the benefit of the latest operating information."

Defendant filed its answer on January 3, 1962 setting up several defenses, the only one pertinent here being the Sixth Defense, namely:

"Defendant says that the amount of damages recoverable in this action is limited in any event to Thirty Thousand Dollars ($30,000) pursuant to the Code of Virginia, Section 8-636."

Twenty-three months later, on December 3, 1963, defendant filed a motion for summary judgment for the dis-

missal of all claims and causes of action in excess of Thirty Thousand Dollars ($30,000) based upon a limitation of such amount in Section 8-636 of the Code of Virginia, 1950, as amended.

By order dated March 2, 1964, entered on Defendant's "Motion for Summary Judgment," the District Judge held that "the measure of damages in an action for wrongful death is governed by the lex loci delecti," and that the Virginia statute limiting liability to Thirty Thousand Dollars ($30,000) was applicable in this case. The District Judge further certified that a controlling question of law was involved "as to which there is substantial ground for difference of opinion," and an appeal was allowed by the United States Court of Appeals for the Sixth Circuit under Section 1292(b), Title 28, U. S. C.

On May 25, 1965, the Court of Appeals affirmed the order of the District Judge. Plaintiff thereafter filed a petition for rehearing, as a result of which on August 26, 1965 the Court of Appeals entered an order making certain additions and corrections to its opinion rendered on May 25, 1965, and denying plaintiff's petition for rehearing.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) There is no genuine conflict between the Ohio Constitution and the Virginia Statute limiting liability; and Virginia having no interest whatever in the outcome, the statute is a nonexistent, illusory and spurious "conflict." See Question No. 1.

In the May 1965 issue of The American Bar Association Journal (Volume 51, page 441), in an article entitled "Revolution in the Choice of Law for Torts," Professor Russell J. Weintraub, one of the leading scholars in the field, states:

"In the past few years the tempo of change has quickened until the situation can best be described as a revolution in the choice of law for torts, particularly in the area of accident law.

"* * * courts have relied on law review commentaries in the field and have found a tongue to explain more clearly what they are doing. What this amounts to is a new approach to solving choice-of-law problems.

"Basically, the new method is this. When the domestic rules of two states having contacts with the parties or the transaction seem to conflict on some crucial issue, the court analyses the policies underlying those domestic rules. Frequently, the analysis will reveal that the conflict is only apparent; that in fact, in terms of underlying policies, the legitimate interests of one of the states can be served without in any way conflicting with the legitimate interests of the other * * *."

Comparable comments by other writers are common. See, e.g. Comments on *Babcock v. Jackson,* 63 Colum. L. Rev. 1212 (1963) (comments by Professors Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese); Harper, Policy Bases of the Conflict of Laws; Reflections on rereading Professor Lorenzen's Essays, 56 Yale L. J. 1155 (1947); Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657 (1959).

Recent cases dealing with some facet of the subject include *Richards v. U. S.,* 369 U. S. 12; *Kilberg vs. Northeast Airlines, Inc.,* 9 N. Y. 2d 34, 171 N. E. 2d 526; *Pearson vs. Northeast Air Lines, Inc.,* 309 F. 2d 553, C. A. 2, cert. den. 372 U. S. 912; *Griffith v. United Airlines, Inc.,* 416 Pa. 1, 203 A. 2d 796; *Babcock v. Jackson,* 12 N. Y. 2d 473, 191 N. E. 2d 279; *Grant v. McAuliffe,* 41 Cal. 2d 859, 264 P. 2d 944; *Schmidt v. Driscoll Hotel, Inc.,* 249 Minn. 376, 82

N. W. 2d 365; *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N. W. 2d 814; *Wilcox v. Wilcox* (Wis. 1965), 133 N. W. 2d 408 and *Fabric v. Horgen* (Iowa 1965), 132 N. W. 2d 410. See also *Van Dusen v. Barrack*, 376 U. S. 612 at 644, 646.

The considerations involved in the recent cases are well summarized in *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A. 2d 796 wherein the court noted:

> "'* * * Almost all authorities agree that there must be a policy analysis approach to replace the place of the injury rule.'"
>
> "'* * * The state in which injury occurred, as such, has relatively little interest in the measure of damages to be recovered unless it can be said with reasonable certainty that defendant acted in reliance on that state's rule. Moreover, where the tort is unintentional, the reliance argument is almost totally untenable. This is abundantly clear in the present case; the site of the accident was purely fortuitous.'"

In Volume 48, Cornell Law Quarterly (1962), pages 215, et seq. in an article entitled "Method for Solving Conflict Problems—Torts" by Professor Russell J. Weintraub, it is stated:

> "I. Identify and Eliminate Spurious Conflicts
>
> The first step in the solution of a choice-of-law problem in the torts area should be the identification and elimination of spurious conflicts. A spurious conflict is present when two or more jurisdictions, having some contact with the parties or the occurrence, have tort rules pointing to different results, but, upon analysis of the purposes underlying the putatively relevant and divergent rules, it becomes apparent that one rule and one rule only is rationally applicable to the case in issue. If, for example, one contact state has a rationally applicable rule making the defendant li-

able and no other contact state has a rule eliminating liability, the purposes of which would be advanced by applying the liability-insulating rule to the case at bar, there is no conflict. The defendant should be liable. * * *" (p. 216.)

"* * * The place of impact, qua place of impact, has no interest in insulating the defendant from liability, unless it can rationally be argued under the circumstances that the defendant has acted in reliance on that place's insulating rule. Such a reliance argument will almost invariably be untenable when directed at rules governing liability for unintentional torts, excluding, of course, such purely directory local rules as speed limits, rules of the road, and the like." (p. 220.)

"* * * spurious conflicts can be identified and eliminated by simply recognizing, as suggested above, that the place of impact as such has no interest in insulating the defendant from liability, absent a reasonable basis for the defendant's arguing that he acted in reliance on the protection of that place's rule." (p. 227.)

"* * * The interest of the place of impact in providing compensation is similarly reduced if the victim is killed and recovery is for wrongful death. The proceeds of such recovery, at least when there are close relatives surviving, are not subject to the claims of creditors. One matter over which it is clear that the place of impact as such has no interest is in the manner of distributing the proceeds of a wrongful death recovery. Any conflict in regard to such distribution between the law of the place of impact and the law of the domicile of the decedent and his next of kin is spurious. The law of the domicile should control. * * *" (p. 228.)

"V. CONCLUSION.

> The plea for a method of solving conflicts problems which is primarily concerned with the policies underlying putatively conflicting domestic rules and with the more general purposes and trends in the substantive area involved—such a plea is not that of a lone voice in the wilderness. Scholars of the first rank have been talking of such things for many years. More significantly for today, judges, led by Roger Traynor of California, are more and more applying such a method to the decision of conflicts cases. * * *" (p. 252.)

While there are no Ohio decisions on the public policies involved in the Constitution of Ohio, as adopted in 1912 prohibiting any limit on the amount recoverable for wrongful death, the United States Court of Appeals placed principal reliance for its decision on *Alexander v. Pennsylvania,* 48 O. S. 623, a case decided in 1891, some twenty-one years before the adoption of the constitutional provision in question prohibiting any monetary limitation on recovery for wrongful death. The *Alexander* case, decided seventy-five years ago, had nothing to do with any monetary limitation of Ohio or any other state. It simply applied the Pennsylvania Fellow Servant Rule to a suit brought by a Pennsylvania resident against a Pennsylvania corporation to recover for injuries sustained in Pennsylvania as a result of the negligence of a Pennsylvania fellow servant; and held that no cause of action existed.

In the Captain Goranson case the relevant negligence found by the Civil Aeronautics Board investigation (and summarized in the complaint) resulted from defendants' violation of the laws of the United States and regulations thereunder, not any law of Virginia. Such relevant neg-

ligence had continued over an extended period of time (up to 18 months) antedating the crash. The *Alexander* case is not only three-fourths of a century distant in time, but even further removed on the facts from the Goranson case; and to repeat, *Alexander* was decided 21 years before the Ohio Constitutional provision, providing that the amount of damages shall not be limited by law, was adopted by the voters of Ohio.

It is conceded in this case that a cause of action exists, both in Ohio and Virginia. The only question is the arbitrary application of a Virginia limitation of liability contrary to the public policy expressed in the Constitution of Ohio.

Obviously, the Ohio Legislature could not enact a statute in conflict with the Ohio Constitution. Can Virginia enact a statute that will be applied by Ohio courts that conflicts with the Ohio Constitution when no purposes of the Virginia statute would or could be advanced by applying such statute, and Virginia has no interest whatsoever in the outcome of such litigation?

The results of the decision of the courts below in this case are that most of the financial burden occasioned by defendants' negligence is cast upon a widow and five minor children with an equivalent windfall for defendants and its liability carrier, The United States Aviation Underwriters, Inc. of The United States Aviation Insurance Group.

The Virginia statute amounts to no more than a nonexistent, illusory and spurious "conflict" with the Ohio Constitution; and the courts below erred in applying such Virginia statute to this case.

(b) The arbitrary and capricious application of the limitation of the Virginia Statute to disregard and override the Constitution of Ohio is a denial of "equal protection of law" and "due process of law" under the Fourteenth Amendment to the Constitution of the United States. See Question No. 2.

Commercial aircraft fly at an altitude and speed that requires an aircraft flying from the West Coast to New York to start its descent over Indiana or further west and to continue to descend at a speed about twice that of high speed commercial elevators to make a landing in New York. Should any such aircraft become disabled as a result of negligent maintenance or operation in violation of Federal laws and regulations, it could conceivably crash over any state east of the Mississippi River.

In a suit in Ohio for the surviving wife and children of an Ohio decedent killed in such a crash, can the protection of the Ohio Constitution and statutes depend upon the fortuitous place where the aircraft comes to rest? If several aircraft collide in mid-air, is it decisive which aircraft a decedent utilized if the aircraft crash in different states? Can three Navy captains ride in adjoining seats in an aircraft, and after a crash, the survivors of the Captain from Pennsylvania and the Captain from New York recover Three Hundred Thousand Dollars ($300,000) but the survivors of the Captain from Ohio be limited to Thirty Thousand Dollars ($30,000)—the only difference being that twenty-five years earlier the decedents received appointments to the Naval Academy at Annapolis from different states which have substantially identical constitutional and statutory provisions for recovery for wrongful death? Should the surviving minor children of two go to Williams College and the surviving minor children of the third go to work when they become eighteen years of age?

The "equal protection" problems are discussed in an article entitled "The Erie Doctrine and State Conflict of Laws Rules," by Professor Russell J. Weintraub, in Volume 39, Indiana Law Journal (1963) at pages 228 et seq. The author states:

> "Again, if the forum would refuse to apply its own rule because the forum's traditional choice-of-law rule points to some other geographical location as having the decisive "contact," such a refusal may be based upon an unreasonable classification if in fact the policies underlying the forum rule would be advanced by applying it and if application would not interfere with the legitimate interests of any other state or unfairly surprise any party. Such unreasonableness should be precluded by the 'equal protection' clause of the fourteenth amendment of the United States Constitution." (p. 243.)
>
> "* * * The answer does lie in removal of artificial limitations which have impeded their efforts to reflect viable current trends and changes in conflicts law not discernible in state opinions which are ripe for overruling. Professor Moore has put it well: 'Although there must be faithful adherence to state substantive law in nonfederal matters, it should be a wise and discerning loyalty, something in the nature of a "prophetic judgment" as to what the highest court would now do.' In an area which is changing as rapidly as is the conflict of laws, there should be a reversal of the current attitude which prevents federal courts from obtaining direct information on the state view of the matter in controversy by staying, for declaratory proceedings in a state court, or, where state statute permits, certifying the question directly to the state court." (pp. 245, 246.)
>
> "First, there might be an expansion of due process and full faith and credit limitations on a state's choice of law. * * * Further, the time is ripe for cautious use of the 'equal protection' clause of the fourteenth

amendment to eliminate some of the irrational classifications which still pervade conflicts dogma." (p. 260.)

See also Note 92 at p. 243 of the article.

We submit that the application of the Virginia statute under the facts of this case is a clear denial of "equal protection of the laws" and "due process of law" under the fourteenth amendment of the Constitution of the United States.

(c) The Court of Appeals erroneously and improperly declined to decide the controlling issue in this case, on the theory that the question never having been passed upon by the Supreme Court of Ohio, the Court of Appeals was prohibited from passing on such question in the first instance. See Question No. 3.

The Court of Appeals in its opinion (p. 751) stated:

> "It is conceded that the Supreme Court of Ohio has never decided the particular question involved."

It is obvious that if the question were presented to it, the Supreme Court of Ohio would follow the Constitution of Ohio, which specifically states that "the amount of damages recoverable by civil action in the courts for death * * * shall not be limited by law." There can be no public policy or practice in Ohio contrary to the express language of the Ohio Constitution.

The fact that the public policy of the State of Ohio is established by constitutional provision rather than by judicial decree does not make it any less the public policy of the State of Ohio, and it is just as binding upon any forum in said state.

The leading case on the power and duty of a Federal Court to pass on a question of state law that has not been

decided by the state courts is *Meredith v. Winter Haven* (1943), 320 U. S. 228, in which this court said:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its nonexercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 618, 80 L. Ed. 920, 924, 56 S. Ct. 600; Risty v. Chicago, R. I. & P. R. Co., 270 U. S. 378, 387, 70 L. Ed. 641, 650, 46 S. Ct. 236; Kline v. Burke Constr. Co., 260 U. S. 226, 234, 235, 67 L. Ed. 226, 232, 43 S. Ct. 79, 24 A. L. R. 1077; McClellan v. Carland, 217 U. S. 268, 281, 282, 54 L. Ed. 762, 767, 30 S. Ct. 501. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act." p. 234, S. Ct. 11, L. Ed. 13.

It is clear that the Court of Appeals had both the power and duty to pass on the question involved and its refusal to do so thwarts "the purpose of the jurisdictional act."

(d) This Court should now decide the applicability of the Ohio Constitution and the inapplicability of the Virginia Statute, it being conceded that the Supreme Court of Ohio has never decided the particular question involved, and no procedure exists to now secure a decision from the Supreme Court of Ohio. See Question No. 4.

In the course of the argument before the Court of Appeals, Judge Weick posed the question if it would now be possible to employ some procedure to secure a decision from the Supreme Court of Ohio.

Ohio does not have a statute similar to Florida Statutes Annotated (1957), Sec. 25.031, or a Supreme Court rule similar to Florida Appellate Rule 4.61 which permits the Supreme Court of Florida to issue opinions on the certification of a question from the Supreme Court of the United States or a United States Court of Appeals. See: *Clay vs. Sun Insurance Office, Ltd.*, 363 U. S. 207 (1960). Same case 377 U. S. 179 (1964). *Aldrich vs. Aldrich*, 375 U. S. 75 (1963). Same case 375 U. S. 249 (1963). Same case 378 U. S. 540 (1964). *Dresner vs. Tallahassee*, 375 U. S. 136 (1963). Same case 378 U. S. 539 (1964).

The only conceivable practice that might be employed in Ohio to ultimately secure an opinion from the Supreme Court would be under the Ohio Uniform Declaratory Judgment Act (O. R. C. 2721 et seq.). The Ohio Supreme Court and Court of Appeals do not have any original jurisdiction in declaratory judgment actions or any jurisdiction to render advisory opinions, so that the case would, in the first instance, be filed in the Common Pleas Court. Secondly, the Declaratory Judgment Act is not applicable when there is a pending case between the same parties on the same issues.

Obviously, any declaratory judgment action regarding a $30,000 limitation would, on its face, be removable to

the federal courts by a non-resident defendant. In commercial aircraft cases, there being no Ohio companies in such business, the question in this case can never, as a practical matter, be passed on by an Ohio court, unless some commercial air line neglects to remove a case to the federal courts, a very unlikely possibility.

The result is that there is no procedure in Ohio that can be employed to secure a decision from the Supreme Court of Ohio as suggested by Judge Weick.

It is clear that under the Jurisdictional Act, the federal courts have the duty and power to pass on a question not heretofore decided by the Ohio courts, and that this Court has the power, if not the duty, to do so. Plaintiff's decedent was killed in January of 1960. We respectfully submit that to avoid further delay before this case can be finally disposed of, this Court should pass upon the question presented, as the Court believes it would be decided by the Supreme Court of Ohio, although the Supreme Court of Ohio has never passed on such question.

(e) The decision of the Sixth Circuit Court of Appeals in this case is in conflict with the holding of the Second Circuit Court of Appeals in PEARSON vs. NORTHEASTERN AIR LINE, 309 F. 2d 553 (cert. den. 372 U. S. 539). See Question No. 5.

The Constitutions of New York and Ohio, in substance, each provide that there should be no limit on the amount recoverable in a wrongful death case. While this provision of the Ohio Constitution employs inherently clear and unequivocal phraseology, there are no Ohio cases considering such provision.

It would be a most natural and persuasive approach for any Ohio court to adopt and follow the New York cases considering a substantially similar constitutional pro-

vision; and such a practice would generally, if not invariably, be employed by the Supreme Court of Ohio.

It is obvious that the decision of the Sixth Circuit Court in this case is in conflict with the decision of the Second Circuit in the *Pearson* case, *supra,* as the two cases reach diametrically opposite results in the application of substantially similar constitutional provisions.

For such additional reasons, the Petition for a Writ of Certiorari should be granted.

CONCLUSION.

The questions presented in this case have not heretofore been presented to or decided by this Court, although such questions currently are the subject of more discussion by the courts and legal writers than any other field of the law.

All of the questions presented are recurrent and of general interest throughout the United States; and we predict will be decided by this Court in the near future.

The Petition for a Writ of Certiorari in this case should be allowed and the questions presented decided now by this Court.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Dated May 25, 1965.)

Before WEICK, Chief Judge, and MILLER and CECIL, Circuit Judges.

CECIL, *Circuit Judge.*

This appeal arises out of a wrongful death action brought in the United States District Court for the Northern District of Ohio, Western Division. The plaintiff-appellant is Henry Goranson, administrator, with the will annexed, of the estate of Harold T. Goranson, deceased. We will refer to Henry Goranson as the plaintiff and to Harold Goranson as the deceased. Capital Airlines, Inc. and United Air Lines, Inc., were named as defendants and are defendants-appellees herein. These two airline companies have been consolidated under the name of United Air Lines, Inc., a corporation organized under the laws of Delaware. Although the deceased was a passenger on a plane of Capital Airlines, we will refer to the appellees as United or the defendant.

It is alleged that the decedent was a resident of the state of Ohio and that the plaintiff was duly appointed administrator by the Probate Court of Wood County, Ohio. The defendant denies the validity of the appointment, apparently on the ground that the deceased was not a bona fide resident of Ohio. For the purpose of this opinion, we must assume that the deceased resided in the state of Ohio at the time of his death.

On or about January 18, 1960, the decedent was a passenger for hire on a Vickers-Armstrong Viscount aircraft of the then Capital Airlines, Inc., a common carrier of passengers by air. The deceased was a Captain in the

United States Navy and was en route from Washington, D. C., to Norfolk, Virginia. While the plane was being operated in the vicinity of Charles City, Virginia, it crashed as a result of the alleged negligence of the defendant and the deceased was killed.

An action was filed by an ancillary administrator of the estate of the deceased in the United States District Court for the Eastern District of Virginia, Norfolk Division, under the style Lawler, *Administrator v. Capital Airlines, Inc., United Air Lines, Inc., et al.* On February 20, 1963, the district judge, in an unappealable order, held that the Virginia statute limiting liability in a wrongful death case to $30,000 was applicable. This action was dismissed without prejudice by the district judge on December 30, 1963. We do not regard this case as being in any way determinative of the questions arising out of the case filed in the Northern District of Ohio now before us.

The complaint was filed in the Ohio court on November 14, 1961. Subsequently, the district judge for the Northern District of Ohio transferred the case to the Eastern District of Virginia. The plaintiff then brought an original action in this Court for a writ of mandamus to require the district judge to vacate the order of transfer. We held that there was no clear abuse of discretion and denied the petition. *Goranson v. Kloeb, United States District Judge,* 6 Cir., 308 F.2d 655 (Oct 13, 1962). By order dated April 10, 1963, 221 F.Supp. 820, the district judge for the Eastern District of Virginia transferred the case back to the Northern District of Ohio, for the reason that the plaintiff did not have capacity to sue in Virginia.

The question in this case arises out of a conflict of the law between Ohio and Virginia in wrongful death cases. Liability in Virginia is limited to $30,000 by Section 8-633, et seq., Code of Virginia, 1950, as amended. Article I, Sec-

tion 19a of the Constitution of the State of Ohio provides, "The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law."

By order of March 2, 1964, entered on a motion for summary judgment, the district judge, for the Northern District of Ohio, held that "the measure of damages in an action for wrongful death is governed by the lex loci delicti" and that the Virginia statute limiting liability to $30,000 is applicable in this case. The district judge certified that a controlling question of law was involved and we allowed an appeal under Section 1292(b), Title 28, U.S.C.

In a per curiam opinion in *Goranson v. Kloeb, supra*, we said that under conflict of laws "Ohio recognizes the application of the principle of 'lex loci delicti' in wrongful death cases" and that "The measure of damages is governed by the law of the place where the accident occurred." Because of the importance of the question on conflict of laws and some recent decisions, we approach the question presented de novo.

[1] Jurisdiction is invoked by reason of diversity of citizenship (Section 1332, Title 28, U.S.C.) and Ohio law is controlling. (*Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.) It is conceded that the Supreme Court of Ohio has never decided the particular question involved.

[2, 3] As early as 1891, in *Alexander v. Pennsylvania*, 48 Ohio St. 623, at p. 636, 30 N.E. 69, at p. 71, the Supreme Court of Ohio said:

> "An act should be judged by the law of the jurisdiction where it was committed; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to

which he owed obedience; if his conduct, according to that law, violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights."

This rule of conflict of laws has been continuously followed in Ohio since that time. *Ellis v. Garwood,* 168 Ohio S. 241, 152 N.E.2d 100; *Louisville & N. Rd. Co. v. Greene,* 113 Ohio St. 546, 149 N.E. 876; *Weiser v. Smith,* 73 Ohio App. 380; *Ford Motor Co. v. Barry,* 30 Ohio App. 528, 165 N.E. 865; *Louisville & N. Rd. Co. v. Greene,* 26 Ohio App. 392, 160 N.E. 495.

We are asked by counsel for appellant, in this wrongful death action, to establish a new rule for Ohio on the grounds that the Virginia limitation of damages is against public policy and that it would affect Ohio domiciliaries inequitably. It is argued that since the Ohio Constitution (Art. I, Section 19a above quoted) prohibits any limitations on damages in a wrongful death action in Ohio a conflicts rule which accepts such a limitation from any other state is contrary to public policy in Ohio and ought not be enforced. It is further argued that when the forum state has significant contact with parties to the litigation who would be adversely and unjustly affected by applying a conflict of laws rule such as Ohio has, it should be abandoned. It is true in this case that the application of the Ohio rule enforcing the Virginia limitation of damages would adversely affect the decedent's family, in that the amount of damages that might be recovered would be limited to $30,000.

The Supreme Court in *Richards v. United States,* 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492, has recognized that there is a tendency on the part of some states "to depart from the general conflicts rule in order to take into account the interests of the State having significant contact

with the parties to the litigation." 369 U.S. 12, 82 S.Ct. 592. We are urged to follow *Kilberg v. Northeast Airlines Inc.*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526, in which the New York court, under similar circumstances adopted the above reasoning and refused to accept the Massachusetts limitation of damages.

There is a definite trend away, in tort cases, from the general rule of conflict of laws in favor of the theory as announced in the *Kilberg* case, *supra*. See the following cases: *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944, 42 A.L.R.2d 1162; *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365; *Haumschild v. Continental Casualty Co.*, 7 Wis.2d 130, 95 N.W.2d 814; *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, 172 N.E.2d 526; *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 92 A.L.R.2d 1162, C.A. 2, cert. den. 372 U.S. 912, 83 S.Ct. 726, 9 L.Ed.2d 720; *Babcock v. Jackson*, 12 N.Y. 2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279, 95 A.L.R.2d 1, and *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796. It is to be noted that all of these cases except *Pearson*, were decided by state courts. No federal court deviated from the rule of conflict of laws adopted by the state in which it sat. In *Pearson, supra*, the Second Circuit followed the New York court in *Kilberg*.

In a recent case, the Supreme Court of Oklahoma declined to follow the lead of New York in *Kilberg*. The Court said:

> "(W)e decline to hold with the view that the public policy of this State pursuant to the theory of Section 7 of Article XXIII of our Constitution is such or so strong as to require a determination that the Missouri statutory limit of $25,000.00, recovery in a wrongful death action does not apply in a suit brought in Oklahoma." *Cherokee Laboratories, Inc. v. Rogers*, Okl., 398 P.2d 520, 525.

There is considerable discussion in the recent cases on whether the extent of damages recoverable is to be treated as part of the substantive or the procedural law of the state.[1] The reasoning in these cases is persuasive but we are not at liberty to adopt a new rule of conflict of laws for Ohio, in the face of such a well established rule as is now practiced in Ohio. In a case such as the one now before us, a federal court sitting in Ohio is limited to interpreting and applying the law of Ohio as it stands. *Erie R. Co. v. Tompkins, supra.*

The recent case of *Cherokee Laboratories, Inc. v. Rogers, supra,* is substantially similar to the case at bar. The plaintiff's (Rogers) decedent was a passenger in an airplane on a flight from Tulsa, Oklahoma, to a point in Indiana. The plane crashed in Missouri and the decedent was killed. An action was brought in Oklahoma, in which state there is no limitation of damages. Missouri has a statute which limits the damages to $25,000. The plaintiff recovered judgment for $250,000. The Oklahoma Supreme Court held that the substantive law of Missouri, including damages, was applicable and reversed the trial court, unless the plaintiff would accept a remittitur of $225,000.

The Court said in its opinion "Under the facts of the present case we are not called upon to indicate what our decision would be if the proof had shown specifically that some of the elements of negligence relied upon by plaintiff had occurred in Oklahoma." 398 P.2d 525. In a letter supplemental to their brief, counsel for plaintiff quote this statement and point out that there are acts of negligence alleged in their complaint which had occurred long prior

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[1] The only mention by an Ohio court on this subject is the following statement by an intermediate court: "The accident, having occurred in Kentucky, the law of that state governs as to liability and the measure of damages." *Louisville & N. Rd. Co. v. Greene,* 26 Ohio App. 392, 404, 160 N.E. 495, 499 (1927).

to the time of the flight and which was the proximate cause of the accident. It is not alleged that these acts of negligence occurred in Ohio. In fact, they are not laid in any particular jurisdiction. As in the Oklahoma case, we are not called on to decide what might be the effect on the plaintiff's case if it could be proved that acts of negligence, which proximately caused the accident, occurred in Ohio or some state other than Virginia.

We find no merit to the constitutional questions concerning the Virginia statute presented by the appellant nor to the argument that the Full Faith and Credit Clause of the Constitution of the United States requires the rule of the *Kilberg* case to be followed.

The motion of counsel for the defendant, which presents the question before us in this case, was denominated a "Motion for Summary Judgment." It was in fact a motion to limit liability for the amount of damages recoverable by the plaintiff, rather than a motion for judgment. We affirm the order of the district judge on this interlocutory appeal that the maximum recovery for pecuniary and punitive damages may not exceed $30,000, for any act of negligence occurring in the State of Virginia which was the proximate cause of the death of the decedent, Harold Goranson.

APPENDIX B.

ORDER OVERRULING PETITION FOR REHEARING AND AMENDING OPINION.

(Filed August 26, 1965.)

Before: WEICK, MILLER and CECIL, Circuit Judges.

The conflict of laws rule in Ohio in wrongful death cases, such as the one now before us, is that the law of the place where the wrong occurred is applicable and the measure of damages is governed by that forum.

Upon the second and third grounds stated for rehearing, the Court will amend the opinion by adding at the end of the opinion, following the figure $30,000, "for any act of negligence occurring in the State of Virginia which was the proximate cause of the death of the decedent, Harold Goranson," and by striking the word "first" in the first line of the second full paragraph on page two.

It is ordered that the petition for rehearing be denied and that the opinion be amended as above stated.

Entered by order of the Court.

s/ CARL W. REUSS,
Clerk.

APPENDIX C.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 25, 1965.)

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 757.

HENRY W. GORANSON,
Administrator with the Will Annexed of the Estate of
Harold T. Goranson, deceased,
Petitioner,

vs.

CAPITAL AIR LINES, INC.,
and
UNITED AIRLINES, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

1. Is a United States District Court, sitting in Ohio, required to follow the Ohio conflict of laws rule in determining which state law provides the measure of damages in an action for wrongful death resulting from an accident in Virginia?

2. In ascertaining the Ohio conflict of laws rule determining the measure of damages for a wrongful death action created by a Virginia statute, should the Federal Courts follow existing Ohio law rather than predict that the Ohio courts would change the Ohio law?

3. Do the "equal protection of the law" or "due process of law" clauses of the Fourteenth Amendment of the

Constitution of the United States prevent the application of the Virginia statutory limit of recovery for this wrongful death action?

4. Is the decision of the Court of Appeals for the Second Circuit in *Pearson vs. North East Airlines, Inc.*, 309 F. 2d 553, cert. den. 372 U. S. 912, in conflict with the decision of the Court of Appeals for the Sixth Circuit in this case?

STATEMENT OF FACTS.

Petitioner's statement of the case and material facts are for the most part correct and we accept the same with the exception of the following qualifications. The allegation of the complaint that plaintiff's decedent, Harold T. Goranson, was domiciled in the State of Ohio at the time of his death is in issue. The claimed Ohio domicile of the decedent appears to be the only possible "contact" of the State of Ohio with this occurrence.

ADDITIONAL STATUTE INVOLVED.

In addition to the statutes set forth in respondents' brief, Ohio Revised Code, Section 2125.01, is involved. This statute reads in part:

> "When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country."

ARGUMENT AND AUTHORITIES.

1. Is a United States District Court, sitting in Ohio, required to follow the Ohio conflict of laws rule in determining which state law provides the measure of damages in an action for wrongful death resulting from an accident in Virginia?

The United States District Court and the United States Court of Appeals for the Sixth Circuit answered this question "Yes."

The effort of petitioner throughout has been to secure a decision from the Federal Courts that the Ohio conflict of laws rule is antiquated, arbitrary and unrealistic and, in the court below, that the choice of laws issue should be decided in terms of "national law" to which *Erie Railroad vs. Tompkins,* 304 U. S. 64, should not apply. In the Petion for Writ of Certiorari (pages 9 to 14), the argument is advanced to a different question, which was not asserted below. This is petitioner's apparent contention that the divergent damage rules of Ohio and Virginia should be regarded as not creating a legitimate "conflict of laws," asking this Court to analyze the relative state interests and to find it not properly a choice of law question at all, in order to make a determination, independent of state conflict rules, as to which rule of damages should be applied.

In *Klaxon Co. vs. Stentor Electric Mfg. Co.,* 313 U. S. 487, this Court said (pp. 496-497):

> "We are of opinion that the prohibition declared in *Erie R. Co. v. Tompkins,* 304 U. S. 64, against such independent determinations by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie R. Co. v. Tompkins, supra,* at 74-77. Any other ruling would

do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County v. White Co.*, 296 U. S. 268, 272. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."

The District Judge and the Court of Appeals correctly considered themselves bound by state determinations of the applicable conflict of law rule. There is no unsettled or novel question of the federal diversity function for review by this Court.

2. In ascertaining the Ohio conflict of laws rule determining the measure of damages for a wrongful death action created by a Virginia statute, should the Federal Courts follow existing Ohio law rather than predict that the Ohio courts would change the Ohio law?

The United States District Court said "Yes," and the United States Court of Appeals for the Sixth Circuit, also answering "Yes," said:

"* * * We are not at liberty to adopt a new rule of conflict of laws for Ohio, in the face of such a well established rule as is now practiced in Ohio."

Respondents contend the answer in both lower courts is correct.

Petitioner in his third and fourth questions presented for review complains that the Court of Appeals should have stated a new rule, contrary to the existing law in Ohio, concerning the measure of damages for a wrongful death action created by a Virginia statute.

There is no doubtful or unsettled question of Ohio law to be clarified in this case. The Court of Appeals for the Sixth Circuit stated the Ohio law succinctly in its prior opinion in *Goranson v. Kloeb,* 308 F. 2d 655. The court said on page 656:

> "Ohio recognizes the application of the principle of 'lex loci delicti' in wrongful death cases. Ellis, Admx. v. Garwood, 168 Ohio St. 241, 152 N. E. 2d 100 (1958). The measure of damages is governed by the law of the place where the accident occurred. Louisville & N. Rd. Co. v. Greene, Admx., 113 Ohio St. 546, 149 N. E. 876 (1925); Alexander v. Pennsylvania Co., 48 Ohio St. 623, 636, 30 N. E. 69; Weiser, Admr. v. Smith, 73 Ohio App. 380, 56 N. E. 2d 522; Ford Motor Co. v. Barry, 30 Ohio App. 528, 165 N. E. 865; Louisville & N. Rd. Co. v. Greene, Admx., 26 Ohio App. 392, 160 N. E. 495. See also: Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 732 (C. A. 6)."

It might be added that Ohio has never recognized an action for wrongful death except as a creature of statute. "No right of action existed at common law for death by wrongful act." *L. & N. Rd. Co. v. Greene, Admx.,* 113 O. S. 546, at page 550; *Sabol v. Pekoc,* 148 O. S. 545, at page 549. The Ohio courts have necessarily therefore looked to the statute creating a foreign cause of action not only for the source of the right, but also its conditions and limitations, as, for example, the proper parties (*Carlson v. Glenn L. Martin,* 103 F. S. 153 (N. D. Ohio E. D.,

1952)) defenses (*Shaffer, Admx. v. N. Y. C. Rd. Co.*, 66 O. App. 417, 34 N. E. 2d 792 (1940)) and elements of damage (*L. & N. Rd. Co. v. Greene, Admx.*, 26 O. App. 392 (1927)).

The Ohio courts have uniformly referred to the lex loci for the law of the measure of damages:

L. & N. Rd. Co. vs. Greene, Admx., 113 O. S. 546 (1925);

L. & N. Rd. Co. vs. Greene, Admx., 26 O. App. 392 (1927, following the retrial of the same case referred to in 113 O. S. 546);

Weiser, Admx. vs. Smith, 73 O. App. 380 (1943).

This action is cognizable in the Ohio courts, but as a creature of the statutes of Virginia, where the accident occurred, and with the nature of the actionable conduct, the parties in whom the right inheres, and the nature and extent of the damages provided to be determined according to the terms of the statute creating and shaping the right—in this case the Virginia statute.

The principal thrust of petitioner's argument appears to be that the Court of Appeals for the Sixth Circuit should have ignored, and that this Court should now ignore, the Ohio Supreme Court's decisions in *L. & N. Rd. Co. vs. Greene*, 113 O. S. 546, and *Ellis vs. Garwood*, 168 O. S. 241, and declare a new conflict of laws rule for Ohio, upon the hopeful supposition that the Ohio courts will some day follow the dictum of the New York case *Kilberg vs. Northeast Airlines*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961).

No reported Ohio case indicates any such view; in no case has an Ohio court adopted a part of the wrongful death statutes of another state and discarded others. There has been no indication of change in Ohio law since

the United States Court of Appeals for the Sixth Circuit said in *Goranson vs. Kloeb:*

> "To our knowledge, Ohio has not adopted the New York dictum. Until the Ohio courts have spoken on the subject, we must follow the law as it is. We should not attempt to make new law for the state in conflict with its existing decisions." 308 F. 2d at 656, 657.

Petitioner cites *Richards vs. United States,* 369 U. S. 1 (1962), as support for his position. We advance it as authority for denial of the writ. In that case, suits were filed in the Federal District Court in Oklahoma to recover from the United States under the Federal Tort Claims Act for additional amounts which were claimed to be due plaintiffs under the Oklahoma wrongful death act, which contains no limitation on the amount a single person may recover from a tortfeasor. The petitioners were the personal representatives of passengers killed when a commercial airplane crashed in Missouri while enroute from Oklahoma to New York. The maximum amount under the Missouri wrongful death act had either been paid or tendered to them by the airline. The claims included allegations that the Government through its agencies was negligent and that such negligence occurred in Oklahoma. The District Court of Oklahoma dismissed the complaint and the Court of Appeals affirmed. On a writ of certiorari, this Court affirmed such dismissal. This Court said in subparagraph (c) of the syllabus:

> "Both the Federal District Court in Oklahoma and the Court of Appeals for the Tenth Circuit have interpreted the pertinent Oklahoma decisions as declaring that an act for wrongful death is based on the statute of the place where the injury occurred that caused the death; that determination of the question of state law is accepted by this Court and is controlling here;

> the Missouri statute, therefore, controls the case; and petitioners have failed to state claims upon which relief could be granted."

In the present case, the Federal District Judge and the Court of Appeals for the Sixth Circuit have each twice reviewed the Ohio decisions, and have found existing Ohio law to be not in doubt.

As in *Richards*, we believe this Court will accept the lower courts' determination of the question of state law and find that the Petition for Writ of Certiorari should be denied.

3. Do the "equal protection of the law" or "due process of law" clauses of the Fourteenth Amendment of the Constitution of the United States prevent the application of the Virginia statutory limit of recovery for this wrongful death action?

The United States District Court in effect said "No," and the United States Court of Appeals for the Sixth Circuit, in affirming the lower court, said:

> "We find no merit to the constitutional questions concerning the Virginia Statute * * *."

Respondents contend the answer in both lower courts is correct.

This Court has said, in *Richards vs. United States*, 369 U. S. 1, that a state whose contact with the activity is sufficiently substantial may in its choice of law process constitutionally apply to the decision of the case the law of one or the other state having an interest in the activity. Petitioner here, in arguing against the inflexibility of the Ohio lex loci rule as it affects his case, urges the Court to a view that the Equal Protection and Due Process clauses of the Fourteenth Amendment require such uniformity of

result of the choice of laws that Ohio (whose interest petitioner asserts is paramount) may not select the Virginia law, or lex loci, but must apply the lex fori.

The District Court and Court of Appeals in this case found nothing to discuss in petitioner's contentions.

Congress has not provided a civil action for damages for wrongful death in its regulation of commercial air travel. Title 49 U. S. C. A., Chapter 20, Subchapter IX, provides penalties for violation enforceable by the government, but no provision is made for private action. This is left to state law.

The federal courts have affirmed the constitutionality of statutes like Section 8-636 of the Code of Virginia, 1950, providing a maximum dollar limit on recovery of damages. In *Richards vs. United States*, 285 F. 2d 521, affirmed 369 U. S. 1 (1961), the 10th Circuit Court of Appeals held that the Missouri (lex loci) statutory limit controlled the amount of recovery and said:

> "But in creating the statutory right of action for wrongful death, it was competent for Missouri to fix the maximum amount of damages recoverable in an action under such statute."

And see:

U. S. Cast Iron Pipe & Foundry Co. vs. Sullivan, 3 F. 2d 794 (C. A. 5, 1925); cert. denied, 268 U. S. 696;

Desoto Motor Corp. vs. Stewart, 62 F. 2d 914 (C. A. 10, 1932;

Schloss vs. Matteucci, 260 F. 2d 16 (C. A. 10, 1958).

This Court has not yet determined that the Full Faith and Credit clause does not *require* a state, in entertaining an action based upon the wrongful death statute of another state, to accept the limit on damages provided by

the statute creating the cause of action. The first decision of the Second Circuit in *Pearson vs. Northeast Airlines, Inc.*, 307 F. 2d 131, held that the *Kilberg* result was unconstitutional as failing to give full faith and credit to the Massachusetts wrongful death statute. In the reversal en banc of its earlier decision, at 309 F. 2d 553 (1962), the Court, divided six to three, held that this partial acceptance of the Massachusetts statute did not violate the full faith and credit requirement. This Court denied certiorari, and in its later opinion in *Van Dusen vs. Barrack, Admx.*, 376 U. S. 612, it stated (p. 629, footnote 24):

> "The defendants, rejecting the view adopted by the Second Circuit in *Pearson v. Northeast Airlines, Inc.*, 309 F. 2d 553, contend that the Full Faith and Credit Clause requires Pennsylvania courts to follow all the terms of the Massachusetts Death Act. We intimate no view concerning this contention."

No such issue appears in the instant case, however. The District Judge, following the clearly defined Ohio conflict of laws rule, has adopted the entire Virginia wrongful death act. Only if he had refused to do so would the constitutional question arise.

This case presents no substantial question under the Constitution of the United States.

4. Is the decision of the Court of Appeals for the Second Circuit in Pearson vs. North East Airlines, Inc., 309 F. 2d 553, cert. den. 372 U. S. 912, in conflict with the decision of the Court of Appeals for the Sixth Circuit in this case?

Petitioner suggests that as the constitutions of the States of Ohio and New York each prohibit monetary limits on the amount recoverable in a wrongful death case and the end result differs, a conflict exists between the

decision of the United States Court of Appeals for the Sixth Circuit herein and the decision of the Second Circuit Court of Appeals in *Pearson vs. North East Airlines,* 309 F. 2d 553 (cert. den. 372 U. S. 912).

Each case is a case of diversity jurisdiction and in each case the Federal Court followed the State Court decisions on a conflict of law question, as it was required to do.

> *Klaxon Company vs. Stentor Electric Mfg. Co.,* 313 U. S. 487 (1941).

The *Pearson* case followed the state law of New York as declared in *Kilberg vs. North East Airlines, Inc.,* 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961). In the *Pearson* case, the Court of Appeals for the Second Circuit said (309 F. 2d at 556):

> "We hold that the ruling of the New York Court of Appeals in Kilberg was a proper exercise of the state's power to develop conflict of laws doctrine; and the court's refusal to apply the limitation of recovery provision in the Massachusetts statute a constitutional exercise of such power."

And again on page 562 that Court of Appeals said:

> "We must emphasize that we are not concerned here with the *wisdom* of New York's choice-of-law, but only with its *power* to choose as it did in Kilberg."

The *Pearson* case involves primarily the question whether the Full Faith and Credit clause of the United States Constitution, Article IV, Section 1, required New York courts to apply the monetary limits of recovery provided by the Massachusetts wrongful death statute. No such constitutional issue is presented by the present case, since it is found that the Ohio courts would, by the Ohio choice-of-law rule, apply the Virginia statute in any event,

and the power of Ohio to make a different choice is not in question.

The difference in end result of the decisions is, of course, produced by a difference in state law.

As the Sixth Circuit opinion points out (Appendix A, p. 26):

> "It is to be noted that all of these cases except *Pearson*, were decided by state courts. No federal court deviated from the rule of conflict of laws adopted by the state in which it sat. In *Pearson, supra,* the Second Circuit followed the New York court in *Kilberg.*"

CONCLUSION.

Activity in the state courts in the field of conflicts of law in tort cases may well bring to this Court questions of the limits of state power to act, in implementation of *Richards v. United States, supra.* This case is not such a case. Assuming Ohio to be the residence or domicile of petitioner's decedent, an interest in the State of Ohio in this action, sufficient to permit application of its conflict of laws rule, is obvious and conceded. The power of the Ohio state courts to determine the measure of damages for this action is, therefore, not the issue; the propriety of the state determination is not a matter which this Court will review.

The Ohio District Court has followed the Ohio conflict of laws decisions, and has reached the result which an Ohio state court would reach. No change in Ohio law should be attempted in the federal courts.

The question in the *Pearson* case of the application of the Full Faith and Credit clause is not presented here, and there is no other substantial constitutional issue.

We respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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